

August 15, 2005

Civil Division-Kent County (739-7641)

Mr. Daniel J. Kramer
8041 Scotts Store Road
Greenwood, DE 19950

Re: **Freedom of Information Act Complaint
Against Sussex County Council**

Dear Mr. Kramer:

On June 20, 2005, our Office received your complaint under the Freedom of Information Act, 29 Del. C. Chapter 100 (“FOIA”), alleging that the Sussex County Council (“the Council”) violated the open meeting requirements of FOIA by: (1) adding two items to the agenda during a meeting on May 24, 2005; and (2) voting in executive session at that same meeting to approve a land acquisition.

By letter dated June 23, 2005, we asked for the Council’s response within ten days. We granted a ten-day extension of time to accommodate the vacation schedule of the County Attorney, and then a second ten-day extension of time to accommodate the vacation schedule of the Clerk of the Council. We received the Council’s response on July 25, 2005.

According to the Council, “[o]n May 24, 2005 Council added two items to the agenda prior to the approval of the agenda at the beginning of the meeting at the request of County

Administrator, Robert L. Stickels. The first of these items dealt with approval of a fence contract for the Sussex County Industrial Air Park and the second dealt with a request for an executive session to hold preliminary discussions on site acquisitions.” The Council denies that any consensus vote took place during the executive session to discuss site acquisitions.

Relevant Statutes

FOIA requires that “[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof.” 29 *Del. C.* §10004(e)(2). “The notice shall include the agenda, . . . however, the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.” *Id.*

“When an agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least six hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.” *Id.* §10004(e)(5).

FOIA authorizes a public body to meet in executive session to discuss “site acquisitions for any publicly funded capital improvements.” 29 *Del. C.* §10004(b)(2). “Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public.” *Id.* §10004(c).

Legal Analysis

A. Agenda Amendments

The minutes of the Council's May 24, 2005 meeting show that at the start of the meeting Councilman Rogers made a motion to amend the agenda: (1) to delete the grant request from the Sussex County Employee Benefit Committee;¹ (2) to add a third item under Michael Izzo, County Engineer, "3. Airport Perimeter Fence – Change Order No. 1"; and (3) to add "Request for Executive Session – Land Acquisition" and "Executive Session – Land Acquisition." The Council unanimously (5-0) approved those changes in the agenda.

The minutes of the May 24, 2005 meeting state "that it was necessary to add the agenda item entitled 'Airport Perimeter Fence – Change Order No. 1' due to time constraints since the Council would not be meeting on May 31st. A delay in the approval of the change order would result in a default of the contract."

The Council provided us with a letter dated July 25, 2005 in which the County Administrator further explains the reasons why the Council amended the agenda for the May 24, 2005 meeting:

Michael Izzo, the County Engineer, asked me to add [the airport perimeter fence issue] on May 23, 2005 to approve Change Order No. 1 on an ex-

¹ You did not take issue with the deletion of an agenda item. We note that deletion of an item on the agenda does not raise the same concerns about public notice under FOIA than additions to the agenda.

pedited basis in order to preserve the existing funding for the project. Although the matter had been placed on a previous agenda of Council, it had to be removed because the Engineering Department did not have all of the necessary cost information to prepare the necessary change order. By the time the Engineering Department obtained the necessary information and prepared the change order, there were less than 7 days remaining before the May 24 meeting and Council needed to approve the change order to preserve the funding.

In his July 25, 2005 letter, the County Administrator also states that he “did not know of the need to discuss [site acquisition matters] with Council when the agenda was posted 7 days prior to the meeting. Both of these were matters where it was necessary for the State to approve a land transfer as to the first item and approve funding as to the second item before I could ask Council for approval. The information discussed during the executive session was not received by me until 5 days before the May 24, 2005 executive session.”

FOIA provides two distinct methods to amend an agenda. First, FOIA allows a public body to change an agenda “to include additional items including executive sessions or the deletion of items including executive sessions *which arise at the time of the public body’s meeting.*” 29 Del. C. §10004(e)(2). Second, FOIA allows a public body to amend an agenda when it “is not available as of the time of the initial posting of the public notice” but any changes must be make “at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.” *Id.* §10004(e)(5).

FOIA contemplates that matters of public business may not be known at the time of the original posting of the agenda, and allows items to be added “at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth

in the agenda.” 29 *Del. C.* §10004(e)(5). We accept the County Administrator’s explanation why he did not include the airport perimeter fence and the executive session to discuss site acquisitions in the agenda for the May 24, 2005 meeting when it was originally posted seven days before. The County Administrator did not become aware of the need for a change order for the fence contract until he was notified by the County Engineer on May 23, 2005. The County Administrator did not become aware of the need for an executive session to discuss site acquisitions until five days before the May 24, 2005 meeting.

Under FOIA, the Council could have amended the agenda for the May 24, 2005 meeting at least six hours in advance to include the fence and site acquisition matters. The problem here is that the Council “did not avail itself of this exception by posting an amended agenda six hours in advance.” *Att’y Gen. Op.* IB22 (Aug. 6, 2003). “We recognize that the business of government does not stop seven days before a public meeting, but FOIA provides flexibility for a public body to amend the agenda up to six hours prior to a meeting to add items that come up suddenly and cannot be deferred to a later meeting.” *Id.*

The Council cannot rely on FOIA’s exemption (Section 10004(e)(2)) to amend the agenda to include a matter of public business that arose during the May 24, 2003 meeting. We have previously determined that a matter of public business does not “arise” at a public meeting “by way of a motion to add the issue to the agenda. By that circular logic, there would be no limits on what business can be discussed at the meeting of a public body, so long as the agenda provided that it was subject to change. We have previously cautioned

that Section 10004(e)(2) of FOIA must be construed narrowly 'lest the exception swallow the rule.'" *Att'y Gen. Op.* IB22 (Aug. 6, 2003) (quoting *Att'y Gen. Op.* 03-IB18 (July 31, 2003) (and earlier opinions cited therein).

The County Administrator was aware of the airport perimeter fence and site acquisitions at least six hours prior to the May 24, 2005 meeting of the Council, and so those matters cannot be said to have come up for the first time during that meeting.

B. Executive Session

We have reviewed *in camera* the minutes of the Council's executive session on May 24, 2005. They show that the five members of the Council met with the County Administrator and the County Attorney to discuss two site acquisitions as authorized by FOIA. There is no evidence that the Council went beyond discussing those matters of public business and voted on them, or reached consensus vote for future official action.

C. Remediation

We do not believe that any remediation is necessary for the Council's failure to amend the agenda for the May 24, 2005 meeting at least six hours in advance to include the executive session to discuss site acquisitions. Even though the Council could have done so, the Council followed the proper procedures under FOIA for going into executive session, "and only discussed matters which FOIA authorizes for discussion by a public body in executive session. If the Committee had given seven days notice to the public of

the executive session, the result would not have been any different. The Committee could still have lawfully met in executive session to discuss [site acquisitions].” *Att’y Gen. Op.* IB18 (July 8, 2005).

We feel differently, however, about the Council’s failure to amend the agenda for the May 24, 2005 at least six hours in advance to include the change order for the airport perimeter fence. We understand that any delay in the approval of the change order could have resulted in a default on the contract, and that the Council was not scheduled to meet again until May 31, 2005. But the Council had other alternatives. It could have amended the agenda for the May 24, 2005 meeting six hours in advance, or it could have noticed a special meeting (which only requires 24 hours notice under FOIA) to consider the change order issue.

The airport perimeter fence change order involved the expenditure of public funds, a core governmental function, the scrutiny of which is assured by FOIA. In previous opinions, we have directed remediation where a public body did not timely amend the agenda for a public meeting to include a contract change order. See *Att’y Gen. Op.* IB22 (Oct. 6, 2003).

For this public notice violation, therefore, we direct the Council to re-notice the airport fence perimeter change order issue for a regular or special meeting of the Council within thirty days of the date of this letter to ratify that change order.

Conclusion

For the foregoing reasons, we determine that the Council met in executive session on May 24, 2005 for a purpose authorized by FOIA: to discuss site acquisitions. We determine that the Council violated FOIA when it added two items (executive session to discuss site acquisitions, and airport perimeter fence) to the agenda for the May 24, 2005 meeting at the start of the meeting because those matters did not arise at the May 24, 2005 meeting, and came to the attention of the County Administrator before the meeting. FOIA required the Council to have amended the agenda to include those two new matters at least six hours in advance of the meeting.

We do not believe that any remediation is necessary for failing to amend the agenda to include an executive session at least six hours in advance because the Council met in executive session for a purpose authorized by FOIA.

We direct the Council to remediate the other FOIA agenda violation by re-noticing the airport perimeter fence matter for a regular or special meeting of the Council within thirty days of the date of this letter to ratify the change order. We direct the County Attorney to notify us in writing within ten days after ratification that remediation has been completed.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

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